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**IN THE
COURT OF APPEALS OF INDIANA**

[illegible]

No. 32A01-0710-CV-455

DARDEN, Judge

STATEMENT OF THE CASE

Indiana Department of Environmental Management (“IDEM”) brings this interlocutory appeal of the trial court’s order denying IDEM’s motion to dismiss the petition for judicial review filed by Subhen Ghosh.

We reverse.

ISSUE

Whether the trial court may exercise jurisdiction over a judicial review proceeding when the Petitioner failed to file the agency record or request an extension of time to file the agency record within thirty (30) days after filing the petition for judicial review, as required by Indiana Code section 4-21.5-5-13(b).

FACTS

On April 27, 2007, the State Employees’ Appeals Commission (“SEAC”) issued its order affirming the termination by IDEM of Ghosh’s employment at IDEM. On May 23, 2007, Ghosh filed with the trial court a petition for judicial review; his petition named SEAC as the only respondent. However, the petition did allege that IDEM was a “part[y] to the agency actions that are at issue” -- his “termination from employment” at IDEM, (App. 5), and on June 6, 2007, IDEM was served with a copy of Ghosh’s petition.

On July 2, 2007, SEAC filed an appearance and a motion to dismiss. The latter argued that Ghosh’s petition should be dismissed because he had failed to invoke the trial court’s jurisdiction by filing the agency record within thirty days of filing his petition.¹

On July 12, 2007, Ghosh filed a motion “to amend the caption” of his petition to

¹ The motion also asserted that SEAC was not a proper party and should be dismissed, and that Ghosh had failed to comply with the statutory requirement (*see* Ind. Code § 4-21.5-5-8(a)(3)) that he serve a copy of the petition upon the Attorney General of Indiana.

add IDEM “as a defendant.” (App. 41). On July 13, 2007, the trial court granted Ghosh’s motion. Also on July 13, 2007, Ghosh filed a motion for an extension of time to file the agency record and tendered the record to the court. His motion admitted that the record “was due on June 22, 2007.” (App. 50). That same day (July 13, 2007), the trial court granted his motion for an extension “up to and including July 13, 2007, and “deemed” the agency record filed on that date. (App. 53).

On July 25, 2007, IDEM appeared² and filed *inter alia* a motion to dismiss Ghosh’s petition because Ghosh had failed to timely file the agency record or request an extension for said filing within thirty days of filing his petition. On August 14, the trial court denied IDEM’s motion to dismiss.

On August 30, 2007, IDEM filed a motion asking the trial court to certify the matter for interlocutory appeal. On September 4, 2007, the trial court issued an order certifying the issue as stated above. IDEM then asked this court to accept its interlocutory appeal, and on November 5, 2007, we accepted jurisdiction of the appeal.

DECISION

The parties agree that because the trial court’s ruling on the motion to dismiss was issued without an evidentiary hearing, *i.e.*, on a paper record, we review the motion *de novo*. *Wayne County Property Tax Assessment Bd. of Appeals v. United Ancient Order of Druids-Grove No. 29*, 847 N.E.2d 924, 926 (Ind. 2006). We proceed accordingly.

² Ghosh asserts that IDEM did not file its appearance until July 27th. However, in most of the file-stamped material in the Appendix, the file-stamped date has been manually changed to an earlier date. The CCS reflects that the appearance was filed the same day that IDEM filed its motion to dismiss and its motions to reconsider – all of which had their filing dates manually written to indicate a July 25th filing. Thus, we conclude that IDEM filed its appearance on July 25th.

Chapter 5 of Indiana’s Administrative Orders and Procedures Act provides “the exclusive means for judicial review of an agency action.” I.C. § 4-21.5-5-1. An aggrieved person may seek judicial review of a final agency action by filing a petition with the trial court within thirty days of the action challenged. I.C. §§ 4-21.5-5-2, 3, 4, 5. Then, “within thirty (30) days after the filing or within further time allowed by the court or by other law, the petitioner *shall* transmit to the court the original or a certified copy of the agency record for review of the agency action” I.C. § 4-21.5-5-13(a) (emphasis added). An extension of time in which to file the record shall be granted by the court for good cause. I.C. § 4-21.5-5-13(b). However, “a reviewing court may grant an extension under” this provision of the statute “only if the request is made during the initial thirty days following the filing of the petition for review or within any previously granted extension.” *Wayne County Property Tax Assessment Bd.*, 847 N.E.2d at 927 (citing *Ind. State Bd. of Educ. v. Brownsburg Cmty. Sch. Corp.*, 813 N.E.2d 330, 333 (Ind. Ct. App. 2004); *Clendening v. Ind. Family & Soc. Servs. Admin.*, 715 N.E.2d 903, 904 (Ind. Ct. App. 1999); *Park v. Med. Licensing Bd.*, 656 N.E.2d 1176, 1179 (Ind. Ct. App. 1995), *trans. denied*; *Crowder v. Rockville Training Ctr.*, 631 N.E.2d 947, 948 (Ind. Ct. App. 1994), *trans. denied*; *Indianapolis Yellow Cab, Inc. v. Ind. Civil Rights Comm’n*, 570 N.E.2d 940, 942-4 (Ind. Ct. App. 1991), *trans. denied*). “Failure to file the record within the time permitted by” the above statutory section, “including any extension period ordered by the court, is cause for dismissal of the petition for review by the court, on its own motion, or on petition of any party of record to the proceeding.” I.C. § 4-21.5-5-13(b).

Ghosh filed his petition for judicial review on May 23, 2007, and it is undisputed that Ghosh did not file the agency record *or* request an extension of time therefor within the following thirty days. Ghosh first argues that his failure did not preclude the trial court’s proceeding to hold jurisdiction in this matter, citing *Indiana State Board of Health Facility Adm’rs v. Werner*, 841 N.E.2d 1196 (Ind. Ct. App. 2006), *clarified on reh’g* 846 N.E.2d 669 (Ind. Ct. App. 2006), *trans. denied*. We find the facts of *Werner* to be critically different. In *Werner*, the petitioner did not file her agency record until thirty-two days after filing her petition for judicial review. Nevertheless, the trial court proceeded to conduct judicial review. On appeal of the trial court’s decision, the respondent argued “that we should set aside the decision of the trial court and dismiss the appeal for lack of subject matter jurisdiction.” *Id.* at 1204. Our opinion indeed states, as Ghosh quotes, that “failure to timely file the record or request an[] extension of time at most affects the trial court’s jurisdiction over the case.” *Id.* at 1206. However, in *Werner* the respondent raised the late filing “for the first time on appeal and did not timely raise it with the trial court.” *Id.* It was on this basis that we found “waived” the respondent’s argument that the trial court lacked jurisdiction to proceed. *Id.*

Ghosh also argues that IDEM “waived the issue” of the trial court’s jurisdiction “by failing to object” to his motion for an extension of time until its filing of a motion to dismiss – which occurred twelve days³ after his motion. Ghosh’s Br. at 7. Inasmuch as Ghosh filed his motion on Friday, and the trial court ruled on it on Monday, we find this

³ Ghosh actually asserts that the objection was filed “fourteen (14) days after” his motion for extension of time. Ghosh’s Br. at 7. Ghosh filed his motion on July 13th; IDEM filed its motion to dismiss on July 25th – 12 days later.

argument somewhat disingenuous. Moreover, the argument expressly discounts the extensive authority cited by our Supreme Court for the proposition that the request for an extension must itself be made within “the initial thirty days following the filing of the petition for review or within any previously granted extension.” *Wayne County Property Tax Assessment Bd.*, 847 N.E.2d at 927. Further, the statute provides that the failure to file the petition within the statutory time requirement “is cause for dismissal of the petition for review by the court, on its own motion, or *on petition of any party of record to the proceeding.*” I.C. § 4-21.5-5-13(b) (emphasis added). The record clearly establishes that on July 2nd, eleven days before Ghosh filed his motion for an extension of time, SEAC – the party of record named by Ghosh as the respondent – had moved for dismissal of the petition on the basis of Ghosh’s failure to timely file the agency record. We find no waiver here.

Finally, Ghosh argues that the trial court’s order denying IDEM’s motion to dismiss “comports with” public policy by allowing the matter to proceed to “a decision on the merits.” Ghosh’s Br. at 8. However, he cites *Werner* for this proposition, and we have already found *Werner* distinguishable from the circumstances presented here. His other proffered authority does not involve application of the Administrative Orders and Procedures Act. The Act expressly declares that “the exclusive means for judicial review of an agency action” is set out in the procedural framework of Chapter 5. I.C. § 4-21.5-5-1. Ghosh failed to comply with the statutory procedure when he neither filed the agency record nor requested an extension for said filing within thirty days of his May 23, 2007, petition for judicial review. That failure was “cause for dismissal of the petition.” I.C. §

4-21.5-5-13(b). Therefore, the trial court erred when it denied IDEM's motion to dismiss.

Reversed.

BAKER, C.J., and BRADFORD, J., concur.